

JOHN IVIE, Esq; Executor
of his late Father JONA- } Appellant.
THAN IVIE, deceas'd,

JOHN GILBERT, Sen. Esq;
and his Son JOHN GIL- } Respondents:
BERT, Jun. and DANIEL
POMEROY,

The Appellant's CASE.



ROGER POMEROY, Esq; being seized in Fee of the Capital Messuage Barton, and Demeanes of Sandridge, and of the Mannor of Brixham, and other Lands in the County of Devon, did, in pursuance of Articles made before his Marriage with Joan his Wife, by Indenture dated the 29th of May 1651. and Fine levied in Pursuance thereof, settle and limit the same, to the Use of himself for Life; with Remainder, as to part, to the Use of his Wife for Life; with Remainder of the whole to the Use of the first and other Sons successively of the said Roger, by his said Wife in Tail Male; and for Default of such Issue, then, from and after the Death of the said Roger, to the Use of John Lampen, and others, Trustees, for

120 Years, upon Trust, that they should raise, levy, and pay out of the Rents, Issues, and Profits of the said Capital Messuage Barton, and Demeanes of Sandridge, and out of all other the Premises, ~~by~~ as well by Leasing for Lives, or 21 Years, any Parts of the said Estate [except the said Capital Messuage Barton, and Demeanes of Sandridge] to the Issue Female of the said Roger, by his said Wife, if but one, the Sum of 1500*l.* and if more than one, then the Sum of 1520*l.* to be equally divided between such Issue Female, and after raising thereof, then the said Premises to be to the Use of the right Heirs of the said Roger Pomeroy, with Power for the said Roger during his Life, and for his Issue Male after his Death, to grant Leases, for, or determinable on, 1, 2, 3, 4, or 5 Lives, of any of the Lands usually so letten [except the Capital Messuage Barton and Demeanes of Sandridge] reserving the Antient Rents.

THE said Roger Pomeroy had Issue by his said Wife, Elias their only Son [who died without Issue in his Father's Life-time] and two Daughters, viz. Joan [who inter-married with Humphry Gilbert, Esq; by whom she had Issue the Respondent, John Gilbert, Sen.] and Elizabeth, [who died unmarried, and made her said Sister Joan her Executrix.]

May 29 & 30,
1706.

THE said Roger Pomeroy, by Indentures of Lease and Release, then dated, voluntarily settled the said Premises, and other Lands in Cornwall, to the Use of himself for Life, and then to Trustees for ten Years; with Remainder to the Use of his Nephew Hugh Pomeroy, for his Life, with Remainder to his first and other Sons in Tail Male, with Remainder to his Grandson, [the said Respondent John Gilbert, Sen.] for his Life, with Remainder to his first, and other Sons in Tail Male, with Remainders over; and the Trust of the said Term of ten Years is thereby declared to be, that if the said Joan, and her Husband Humphry Gilbert, should at the Request and Costs of the said Hugh Pomeroy, or of such Persons as should be entitled to the said Estate, after Roger's Death, by the Limitations aforesaid, release the said 1500*l.* and all demands under the Settlement in 1651, that then the Trustees of the said Term of ten Years, should raise 1900*l.* and pay 400*l.* thereof as thereby directed, and invest the remaining 1500*l.* in a Purchase of Lands, to be settled on the Respondent John Gilbert, Sen. in Tail, with Remainder to the said Joan his Mother in Fee, and after the 1900*l.* was raised, or if the Person next in Reversion should, within 6 Months after Roger's Death, secure the said 1900*l.* to be paid within 5 Years to the Approbation of the Trustees, then the said Term was to be Assigned to attend the Inheritance, with Power reserved in this Settlement, for the said Hugh Pomeroy, and all others, being in Possession, under the said Limitations, to grant Leases for 1, 2, or 3 Lives.

IN July 1708, the said Roger Pomeroy died, having made his Will, and the Respondent John Gilbert, Sen. his Executor, and upon Roger's Death, the said Hugh Pomeroy entred on the Estate, and all the Trustees in the said Term of 120 Years being dead, in the Life-time of the said Roger, and John Lampen, the surviving Trustee, dying intestate, Letters of Administration, as to the said Term of 120 Years, were June 23, 1709, granted to the said Respondent John Gilbert, Sen. as Executor of the said Roger Pomeroy; but the said Letters of Administration were afterwards revoked, and new Letters of Administration on the 28 Feb. 1711, granted to the said Joan Gilbert, and She and her Husband Humphry Gilbert (in her right) were entitled to the said 1520*l.* to be raised according to the Trust of the said Term, but the said Respondent John Gilbert, whilst he was Administrator to the said surviving Trustee, as aforesaid, as well as the said Joan Gilbert and her Husband, permitted the said Hugh Pomeroy, to continue in the quiet Enjoyment of the said Premises.

Jonathan

May 8. 1712.

Jonathan Ivie [the Appellant's Father] having at the Request of the said *Hugh Pomeroy*, agreed to advance 1500*l.* towards Payment of the said 1520*l.* and Interest, thereupon, by Indentures dated as in the Margin, in consideration of 1500*l.* paid by the said *Jonathan Ivie* to the said *Humphry Gilbert*, and *Joan* his Wife, and of 308*l.* 14*s.* 9*d.* to them paid by the said *Hugh Pomeroy*, [in full of the said 1520*l.* and Interest] they the said *Humphry Gilbert*, and *Joan* his Wife did assign, and the said *Hugh Pomeroy* confirm, the Remainder of the said Term of 120 Years, unto the said *Jonathan Ivie*, under a Proviso and Agreement for Redemption, and Assigning the said Term to the said *Hugh Pomeroy*, his Executors and Administrators, on Payment of 1500*l.* and Interest, to the said *Jonathan Ivie*, on the 8th Day of Nov. then next, which the said *Hugh Pomeroy* covenanted to pay accordingly.

IN October 1715, the said *Hugh Pomeroy* died without Issue, having made his Will, and thereof *Gilbert Pomeroy*, Executor, who is since dead, having made the Respondent *Daniel Pomeroy* his Executor.

IN October 1715, [upon the Death of the said *Hugh Pomeroy*] the Respondent *John Gilbert*, Sen. entred upon the said Estate [and is in Possession thereof] and paid to the Appellant's Father part of the Interest of the said 1500*l.* and gave Notice to the Appellant to pay in the Principal; but instead of paying the Money, exhibited a Bill in Chancery against the Appellant, and the said *Daniel Pomeroy*, seeking a Redemption of the said Term, and to charge the Appellant [by sinking his Debt] with the Profits received by the said *Hugh Pomeroy*, after his Failure in Payment of the Mortgage Money, [which was to have been paid Nov. 8, 1712.] and to compel the said *Daniel Pomeroy* to make good those Profits to the Appellant, out of the Assets of the said *Hugh Pomeroy*; insisting particularly by such Bill, that a Debt of 478*l.* 13*s.* 4*d.* due from the said Respondent *John Gilbert*, Sen. to the said *Hugh*, [and as such Part of his Assets] might be so applied; but the said Respondent *John Gilbert*, Sen. not proceeding with Effect in such Suit, the Appellant exhibited his Bill into the said Court of Chancery, against the Respondents to have a Satisfaction of his said Debt with Interest and Costs, or to foreclose them from any Equity of Redemption; to which Bill, Answers were put in by the said Respondents, and the Respondent *Daniel Pomeroy*, by his Answer, denied Assets of the said *Hugh Pomeroy*, and the Cause being at Issue, several Witnesses were examined, and their Depositions published.

April 13. 1722.

THE Cause was heard before the Right Honourable the Lord High Chancellor of Great Britain, who was pleased to declare, that by the Intention of the Deed in 1651, the 1520*l.* was to be raised out of the Rents and Profits of the said Estate, and by Leasing thereof, and that the said Money [no time of Payment being appointed] could not carry Interest during the Life-time of the said *Hugh Pomeroy*, and that he the said *Hugh*, ought to have applied the Rents and Profits of the said Premises, for raising the said 1520*l.* and that the Appellant's Father, after his said Mortgage, suffering the said *Hugh Pomeroy* to receive the Profits, and taking his Covenant to pay the Money, his the said *Hugh*'s Receipts, ought to be taken as the Receipt of the Appellant's Father; and thereupon Decreed an Account to be taken of the Rents and Profits of the said Premises, received from the date of the said Mortgage, to the Death of the said *Hugh Pomeroy*, and that such Profits should go to sink the Appellant's Debt [for which also no Interest was to be computed during that Time] and that the Residue only of what was due to the Appellant, with Interest for the same, and Costs, should be answered and paid by the Respondent *John Gilbert*, Sen. out of the Rents and Profits of the said Premises, or by Leasing thereof, which he, the said Respondent was to account for, and answer to the Appellant, with Interest for such Profits, from time to time, as he received the same; and Directions are also given, for taking an Account of the Profits of the said Estate received by the said *Hugh Pomeroy*, before the Date of the said Mortgage made to the Appellant's said late Father, and the Profits so received by *Hugh*, before the Date of the Mortgage, are decreed to be paid to the Respondent *John Gilbert*, Sen. according to the Course of Administration; and the Profits received by *Hugh*, after the Date of the Mortgage, with Interest for the same, from time to time, as received, are decreed to be paid to the Appellant, out of *Hugh*'s Assets (of which an Account is directed to be taken): And it was also further Decreed, that the Master [to whom the Account was referred] should see how the Estate stood, at the time of the Death of the said *Hugh Pomeroy*, and what Monies might have been received, by filling up Leases by the said *Hugh Pomeroy*; and after the said Master's Report, his Lordship would give further Directions, how far the Respondent *Gilbert* should be chargeable therewith.

N. B. BY this Decree, as it stands, the Appellant, as Executor to a Mortgagee for 1500*l.* and about 600*l.* Interest, is turned round from a Real Security, to not only a Personal Security, but in Effect to none at all. — For here must be first an Account taken (at above 10 Years Distance) of the Profits of the Estate received by *Hugh Pomeroy*, from the Date of the Mortgage, and after that, an Account of his Assets, in order to gain a Satisfaction for such Profits, from an Executor of an Executor, who hath denied Assets; and to both which Accounts the Appellant is a perfect Stranger, and as such, is liable to be overcharged in the Profits, for want of the Accounts and Vouchers of the Outgoings, and at last likely to lose the whole Profits, which (as it is given out by the Respondents) will be much more than half the Debt, which is now above 2100*l.* for Principal and Interest; and therefore the Appellant has appealed against this Decree, and humbly prays, that the same may be reversed, for these (amongst other) Reasons, viz.

First, THE Money to be raised was for Daughter's Portions, [which in their Nature require to be paid in gross or entire Sums] and was to be raised as well by Rents or Profits, as by Leasing for Lives, and consequently (as the Appellant is advised) might have been raised by a Mortgage, or Sale of the Trust Term; which Term being for 120 Years, was an Estate in Law, sufficient for that Purpose;

pose; and it could not be the Intent of the Settlement, to oblige the Trustees immediately to enter on the Estate, and that only the *immediate* Profits from the Death of *Hugh Pomeroy*, should be applied to the Payment of the Portions, when the Trustees had so long a Term as a Security, and might (as the Appellant is advised) have entered at any time within the Term.

Secondly, As the Nature of a Daughter's Portion requires it to be paid in an entire Sum, so the Support of the next Taker of the Estate (subject to the Charge of a Portion) requires that the Portion should not be raised by *annual Profits*, since that would in many Cases, be a Means to starve the Heir of the Family, whose Provision must be supposed to be intended, equally with that of the Daughters; and especially, where (as here) the next Taker *Hugh Pomeroy*, (then Nephew and Heir Male to *Roger*) was only Tenant for Life: And it is a general Rule in Equity, That a Tenant for Life is out of the Annual Profits, only liable to keep down the Interest, which was understood by all Parties concerned, at the time of the Mortgage, to be the Justice of this Case; the principal Portion (within 20 *l.*) being then taken up on the Mortgage [to continue a Charge on the Estate] and the Interest incurred from *Roger Pomeroy's* Death paid off by *Hugh Pomeroy*, the Tenant for Life, who received the Profits; and the Respondent *Gilbert*, Sen. was (doubtless) of the same Opinion, when he (since the Death of *Hugh Pomeroy*) paid to the Appellant's Father, part of the Interest, and gave Notice to the Appellant to pay in the Principal; and that his Opinion was such, is evident from hence, *viz.* That he, whilst Administrator to the surviving Trustee, and, when consequently he had the Estate in Law in the Term, permitted *Hugh Pomeroy* to continue in the Possession, and apply the Profits to his own Use.

Thirdly, It is apprehended, that no Precedent comes up to this Decree, and that this may be a Case of general Extent, and therefore of great Consequence, as well in Relation to Heirs, as to Daughters Portions, in all Family Settlements, where the Trusts for raising Portions, are often express'd in Terms much the same as in this Case.

Fourthly, SUPPOSING the Appellant and his Father were bound to take the Mortgage Money by Receipt of Profits only, yet the Appellant's Father could not enter on the Estate, till Failure of Payment of his Mortgage Money, at the Time appointed by the Mortgage, which was six Months after its Date; notwithstanding which, the Profits of the Estate from the Date of the Mortgage, are decreed to go to sink the Debt, for this Reason, [as mentioned in the Decree] that the Appellant's Father suffered *Hugh Pomeroy* to receive the Profits; and yet the same Decree has permitted the Respondent *Gilbert*, Sen. to continue in the Receipt of the Profits, whereby the like Inconveniency may happen on his Death, as has already happened on the Death of *Hugh Pomeroy*, whose Representative denies Assents.

Lastly, THE Appellant has the legal Estate in the Term of 120 Years. That Term was created to raise the Portion, and the Money has been advanced on a Mortgage of the Term, to pay that Portion even to the Father and Mother of the Respondent *Gilbert* Senior, who claims under a voluntary Settlement, and who would now have the Appellant lose the greatest Part of it, without any Imputation of Fraud in the Appellant, or his Father.

And therefore the Appellant humbly prays, That the said Decree may be Revers'd, and the Order usual in Cases of Foreclosure made, (*viz.*) That the Respondent do pay the Principal and Interest, with Cost, by a short Day, or be Foreclos'd from all Equity of Redemption.

THOMAS LUTWYCH.
W. PEERE WILLIAMS.

JOHN IVIE, Esq; Executor of
his late Father JO NATHAN
IVIE, deca'sd, Appellant.

JOHN GILBERT, Sen. Esq; and
his Son JOHN GILBERT, Jun.
and DANIEL POMEROY, Re-
spondents.

The Appellant's Case.

To be Heard on *Wednesday* the
Fifth Day of *February* 1723.

